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No._____

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1983

BRADLEY THOMAS PFEIFER and
DIANE RENE PFEIFER, PETITIONERS

vs.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE NINTH CIRCUIT COURT OF APPEALS

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BRADLEY THOMAS PFEIFER
and DIANE RENE PFEIFER

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and DIANE RENE PFEIFER

QUESTIONS PRESENTED

1. May the government direct a private carrier to seize a suspicious package and transport it to government agents for further search without first obtaining a warrant?

2. Does a government agent who without a warrant opens an envelope sealed in a closed container entrusted to a private carrier violate the Fourth Amendment prohibition against unreasonable searches?

3. Is Illinois v. Gates to be applied retroactively to searches conducted prior to the date of the decision?

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CONSTITUTION

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Petitioners, BRADLEY THOMAS PFEIFER and DIANE RENE PFEIFER respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in their proceeding on September 26, 1983.

OPINION BELOW

The opinion of the Court of Appeal (Appendix A, infra, p. 1-7) is not reported.

JURISDICTION

The judgment of the Court of Appeals was entered on September 26, 1983. On October 10, 1983, BRADLEY THOMAS PFEIFER and DIANE RENE PFEIFER petitioned the Court of Appeals for rehearing. On November 29, 1983, that request was denied. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

CONSTITUTIONAL PROVISION

United States Constitution, Amendment IV:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF FACTS

On April 7, 1982, a man identifying himself as Miroslav Heran from the Induvet International Company sent a package to a San Diego address from the Federal Express office in Fort Lauderdale, Florida (Reporter's Transcript, hereinafter "R.T.", 7-8). Robert Crump, the Southern Regional Security Manager for the Federal Express Corporation, was working in the Fort Lauderdale office at the time. He became suspicious of the package because it was of minimum weight, was shipped from one private party to another and was not professionally wrapped. In addition, he noted that the private individual had chosen the Federal Express system which is more expensive than any other shipping medium. (R.T. 6, 8, 12-13). Mr. Crump attempted to confirm the shipper's name and address in a directory but could find no listing for Miroslav Heran nor Induvet International.

(R.T. 13). Mr. Crump's observations led him to suspect that the package contained narcotics. (R.T. 20). The Federal Express Corporation has a set of procedures its employees follow when they suspect narcotics are being transported. (R.T. 22). The employee first opens the suspicious package. If drugs are discovered, the employee then must call the Drug Enforcement Agency for further instructions. (R.T. 21-22). Mr. Crump followed his company's policy and worked with the DEA on the Heran case. After the package was received, Mr. Crump opened it, and underneath several layers of feathers and inside a plastic bag, he discovered what looked like cocaine. (R.T. 15). Mr. Crump next called the local DEA office, reported that he had several ounces of cocaine, and asked whether the local office wanted to handle the matter. The Fort Lauderdale office told Mr. Crump to call Agent Lough at the San Diego DEA

office. Mr. Crump accordingly called Agent Lough for further instructions and was told to deliver the package to San Diego. (R.T. 17, 35). Mr. Crump resealed the package and sent it to San Diego. (R.T. 37).

The following morning, Agent Lough retrieved the package from Kris Young, the station manager at the Federal Express office in San Diego. (R.T. 59-60). Agent Lough unsealed the package and reached inside. He found a number of plastic bags containing feathers. Under these bags, he found a plastic bag containing a white powder. He removed some of the powder and performed a field test which indicated the possible presence of cocaine. (R.T. 61, 63). At no time prior to the inspection of the package did Agent Lough attempt to verify Mr. Crump's position at Federal Express or Mr. Crump's reputation with the Florida DEA office. The agent did not obtain a warrant authorizing his search.

(R.T. 59).

Agent Lough arranged for Federal Express employees to deliver the package under DEA direction to the residence to which it was addressed. He obtained a warrant authorizing the search of the residence after the package was delivered based on the above information. (R.T. 62-63).

The package was delivered as planned. (R.T. 63). Diane PFEIFER accepted the package, signed for it, and reentered the residence. (R.T. 87). One-half hour later, DEA agents executed the search warrant Agent Lough had obtained and found the package in a front bedroom of the PFEIFER residence. (R.T. 64, 66). Agents also elicited statements and other evidence from Petitioners during the search. The statements and evidence so obtained formed the basis for the narcotics prosecution of Mr. and Mrs. PFEIFER for conspiracy to

possess a controlled substance with intent to distribute in violation of 21 U.S.C. sections 846 and 841(a)(1). (R.T. 69). Petitioners' moved to suppress all the evidence seized, in accordance with their Fourth Amendment right, in the United States District Court for the Southern District of California, Judge William B. Enright presiding. The motion was denied. The PFEIFERS were subsequently tried before the Honorable William B. Enright on stipulated facts and convicted as charged.

Mr. and Mrs. PFEIFER appealed their convictions to the United States Court of Apppeals for the Ninth District. The judgment of the Court of Appeals affirmed the district court's refusal to suppress the evidence.

REASONS FOR GRANTING THE PETITION

This case presents an instance of government activity directly effecting the conduct of a private carrier. Here, the

government agents directed the warrantless seizure of a package in Florida, had it shipped to agents in California and conducted a warrantless search of its contents. The question at bar is whether officers must first obtain a search warrant prior to opening a sealed package that has been previously opened by a private citizen and resealed, and whether the fruits of such a search can be considered in passing on the validity of a later warrant. The Ninth Circuit Court of Appeals has said this activity is reasonable. Mr. and Mrs. PFEIFER contend that the DEA violated their Fourth Amendment rights by searching their house with a warrant based on illegally obtained information and lacking in probable cause.

This Court is currently considering a similar case, United States v. Jacobsen, 683 Fed.2d 296, 300 (8th Cir. 1982), cert. granted, 103 S.Ct. 1271 (1983), in which the Court of Appeals for the Eighth Circuit held that government agents who, without a warrant, removed plastic bags discovered in a private search of a damaged package, took samples of powder in the bags, and performed chemical analysis on the powder, violated the intended recipient's Fourth Amendment rights. Consideration of the instant case would afford the Court another opportunity to examine a Jacobsen-type violation, unify the circuits, and correct the erroneous precedent set by the Ninth Circuit. The instant case differs from Jacobsen in some ways. In Jacobsen, the contents of the package which came into the officer's possession were in plain view. In the instant case, Agent Lough had to open a sealed package in order to view the plastic

bag contained therein. In addition, the search in the instant case formed the basis for a later search of the PFEIFER residence.

Considerations of justice also require that this Court review Mr. and Mrs. PFEIFER's case in light of a potentially favorable yet non-retroactive decision in Jacobsen. If this Court denies Mr. and Mr. PFEIFER's petition yet non-retroactively affirms the opinion of the Court of Appeals for the Eighth Circuit, the PFEIFERs will be unfairly held under the old law even though their case arose after the Jacobsen case and even though their Fourth Amendment rights were equally violated.

I. THE SEARCH WARRANT EXECUTED ON THE PFEIFER RESIDENCE WAS BASED IN MATERIAL PART ON ILLEGALLY OBTAINED INFORMATION

A. The Government Illegally Seized The Package.

Warrantless governmental seizures are *per se* unreasonable unless special circumstances exclude compliance with the Fourth Amendment's warrant requirement. *Coolidge v. New Hampshire*, 403 U.S. 443, 454 (1971). The transportation of the package from Florida to California was undeniably a governmental seizure, instituted, according to Mr. Crump, at the DEA's direction. The following excerpt of the transcript of the hearing on the motion to suppress evidence at page 34-36 illustrates this point.

> Q: (by defense counsel) And you told him (Agent Lough) you had a package . . .
>
> A: (Mr. Crump) Yes.

Q: And you asked him, then, what he (Lough) wanted to do with it, correct?

A: I asked . . . if they were interested in pursuing the delivery of the package.

Q: If they had said they didn't want anything to do with it, what would you have done with the package?

A: I would have called up the local DEA and had him come pick it up and sign for it.

Q: The package got to San Diego because the San Diego Drug Enforcement Administration asked you to ship it out here?

A: Yes. . . They said, "Yes. Ship it out."

The DEA therefore directed Mr. Crump to ship the package yet neglected to obtain a warrant authorizing its seizure. The Court of Appeals for the Ninth Circuit failed to consider the legality of this

seizure which invariably tainted all activity which followed under the rule of Wong Sun v. United States, 371 U.S. 471 (1963).

B. The Government Illegally Searched The Package.

Even if the package had lawfully come into Agent Lough's possession, he did not have a warrant authorizing his subsequent intrusion into the package to perform a chemical field test. Ever since Ex Parte Jackson, 96 U.S 727 (1878), established that sealed packages placed in the mail cannot be opened without a warrant, it has been well-settled that an officer's authority to possess a package is distinct from his authority to examine its contents. Arkansas v. Sanders, 442 U.S. 753, 758 (1979); United States v. Chadwick, 433 U.S. 1, 10 (1977). The decision in Walter v. United States, 447 U.S. 649 (1980) supports the PFEIFERS' argument that Agent Lough's actions violated the Fourth

Amendment. In Walter, a private party opened a shipment of allegedly obscene films and called the FBI to view the films to determine if in fact they were obscene. The FBI did so without making any effort to obtain a warrant. This Court concluded that "The projection of the films was a significant expansion of the search that had been conducted previously by a private party and therefore must be characterized as a separate search. That separate search was not supported by any exigency, or by a warrant even though one could have easily been obtained." Walter, supra, at 657.

This line of reasoning was followed by the Court of Appeals for the Eighth Circuit in United States v. Jacobsen, supra. Considering facts where, in contrast to the instant case, the contents of a package were in plain view, the court in Jacobsen held:

> The DEA agent's extension of the private search precisely parallels

> that in Walter. In both cases, viewing the objects with unaided vision produced only an inference of criminal activity. In both cases, government agents went beyond the scope of the private search by using mechanical or chemical means to discover the hidden nature of the objects. The governmental activity represents a significant extension of the private search because it revealed the contents of the films in Walter and, here the composition of the powder.
> Nor does the fact that the package and one or more of the boxes had been opened by a private party before they were acquired by the FBI excuse the failure to obtain a search warrant.

The Court of Appeals for the Ninth Circuit rejected this argument, in the instant case, citing Illinois v. Andreas, 51 U.S.L.W. 5157, 5158-59 (U.S. July 5, 1983). That decision was rendered on July 5, 1983, after Agent Lough conducted his search of this package. Even if Andreas were made expressly applicable to all cases pending when it was decided, the opinion does not address the issue at bar -- whether Agent Lough's initial search was lawful. In

Andreas, this Court held that "no protected privacy interest remains in contraband once government officers lawfully have opened that container and identified its contents as illegal." Illinois v. Andreas, supra, 33 Cr.L. 3269, 3270 (7-6-83)(emphasis added). Andreas presupposes that the initial government search is lawful, a point at issue in the instant case. Andreas is also limited to cases where "government officers," (in that case, customs officials) not private parties, conduct the initial search. To apply Andreas to the case at bar, one would have to cloak Mr. Crump with the garb of a government officer -- an action the government is loathe to take because if he were a government agent, Mr. Crump's initial warrantless search would then clearly violate the Fourth Amendment.

II. WITHOUT THE FRUITS OF THE ILLEGAL SEIZURE AND SEARCH OF THE PACKAGE THE WARRANT EXECUTED ON PETITIONERS' HOME IS NOT SUPPORTED BY PROBABLE CAUSE.

The Court of Appeals for the Ninth Circuit refused to reverse Petitioners' conviction stating that, "Excluding the results of Lough's search, the remaining facts recited in the affidavit are sufficient to establish probable cause." Appendix A, p. 6. The remaining facts upon which the court relies therefore entail Mr. Crump's initial observations and search of the package. In reaching its conclusion, the court erred in retroactively applying the "totality of the circumstances" test this Court announced in Illinois v. Gates, 103 S.Ct. 2317 (1983). The court additionally applied Gates to circumstances not contained in the affidavit supporting the warrant executed at the PFEIFER home.

A. The Aguilar-Spinelli Standards For Probable Cause Were Not Met.

The search of the PFEIFER residence took place on April 8, 1982. Illinois v. Gates was decided on June 8, 1983. Illinois v. Gates, supra. Since the seizure predated the Gates decision, the affiant clearly could not have relied upon the authority of Gates when he drafted the search warrant for presentation to the issuing magistate. The warrant was issued under the rule of Aguilar v. Texas, 378 U.S. 108 (1964), where this Court established a two-prong test for determining whether informant-generated information such as that supplied by Mr. Crump establishes probable cause. The Aguilar test required 1) factual information of which the informant has personal knowledge, and 2) a factual basis that the informant was credible or his information reliable. Spinelli v. United States, 393 U.S. 410 (1969) later established that

information received from a reliable informant will constitute probable cause if the basis for the claim of reliability is set forth and some underlying circumstances are established which demonstrate the information is based upon personal knowledge of the informant.

Agent Lough's affidavit clearly failed to set forth facts establishing the Aguilar-Spinelli requirements because none existed. When Mr. Crump called Agent Lough to tell him about the package, the two men were complete strangers to one another. Agent Lough and Mr. Crump had never met. Agent Lough had never relied upon nor used Mr. Crump's information concerning the identification of controlled substances on any prior occasions. As far as Agent Lough was concerned, Mr. Crump was nothing more than an untested informant. For an untested informant to provide probable cause, there must be independent corroboration of the

informant. Aguilar v. Texas, 378 U.S. 108, 114 (1964); United States v. Harris, 403 U.S. 573 (1971). In this case, no independent corroboration of Mr. Crump's information was sought or obtained. Agent Lough did not contact authorities in Florida to verify Mr. Crump's position at Federal Express or his ability to recognize cocaine.

B. The "Totality Of The Circumstances" Test For Evaulating Probable Cause Under Illinois v. Gates Was Not Met In The Instant Case.

The Court of Appeals for the Ninth Circuit retroactively applied the "totality of the circumstances" test announced in Illinois v. Gates, supra, to the case at bar. While the law has never been crystal clear in the area of retroactive application of new decisions of the United States Supreme Court, [see, United States v. Johnson, ___ U.S. ___, 73 L.Ed. 2d 202 (1982)], a newly announced Fourth Amendment

principle which constitutes a clear break with the past will be given prospective application only. United States v. Peltier, 422 U.S. 531 (1975). Clearly, the new standards for review of informant-generated probable cause constitutes a "clear break with the past". To find otherwise would affirm the continued vitality of the Aguilar-Spinelli standards the court had to ignore in order to find probable cause. Even assuming that Gates applies to the case at bar, the court erred in finding probable cause under its standards.

This Court noted in Gates that even under the new test it announced, information from an unreliable informant, standing alone, is insufficient to confer probable cause upon the officers seeking a search warrant. Illinois v. Gates, supra, at 541. Moreover, the Gates court held that in evaluating probable cause under the

"totality of the circumstances" test, the reviewing court ought to look to traditional Aguilar-Spinelli concerns, but that the court is not bound to apply those factors in a rigid, mechanical fashion. Illinois v. Gates, supra, at 543. Thus, the Aguilar-Spinelli formulation still has continued vitality in assessing whether the affidavit submitted in support of the search warrant rises to the level of probable cause. The warrant affidavit must present facts enabling the magistrate to conclude that the informant is credible and his informaton is reliable. Aguilar v. Texas, 378 U.S. 108 (1964); United States v. Taylor, 656 F.2d 1326, 1330 (9th Cir. 1981).

A review of the memorandum opinion of the Court of Appeals for the Ninth Circuit reveals the court relied on the following facts that Mr. Crump supplied to establish profable cause:

a) The package was amateurishly wrapped;

b) The package was light;

c) The package was not a business-to-business delivery;

d) It cost much more to send the package by Federal Express than by other means;

e) Mr. Crump found no listing in the telephone directory for Miroslav Heran or Induvet International;

f) Opening the package revealed a plastic bag wrapped in feathers containing what Mr. Crump believed was cocaine.

The following examination of the factors relied upon by the court show mistakes of fact and misplaced reliance in

analysis:

a) The affidavit states the package was light. Mr. Heran told the receiving clerk the package contained feathers. (R.T. 10-11). Therefore, it would not be suspicious for the package to be light.

b) The affidavit does not mention that the package was amateurishly wrapped. Reliance upon such a conclusion is a mistake of fact by the Ninth Circuit Court of Appeals.

c) The affidavit states the package was shipped from a private individual when in fact, the package was from a company, Induvet International, to an individual.

d) Federal Express guarantees overnight delivery to the addressee and accordingly charges a higher rate. (R.T. 31). Payment of a higher price in exchange for better service is hardly suspicious.

e) The affidavit states that local directories did not list "Misoslavi Heran

or Indvvet International." These spellings are different then those listed on the package. No mention is made of what directories were consulted or how recent an edition was reviewed. The Court of Appeals assumed a telephone directory was consulted. No mention of such is contained in the affidavit in support of the warrant.

f) No proof was offered of Mr. Crump's expertise in determining whether white powder is cocaine. In fact, Agent Lough's actions show he did not rely on Mr. Crump for this information because Agent Lough conducted his own field test on a sample from the package. Indeed, simple observation is inadequate to determine if a substance is cocaine. Even a highly trained expert in the detection of narcotics like Agent Lough relied on a chemical field tests to conclude the powder may have been cocaine. Correcting these mistakes of fact in the Court of Appeals'

opinion leaves sparse support for even suspicion of the package and falls far below the standards required for probable cause. Even though the delivery of the package by Federal Express to San Diego as coordinated corroborated Mr. Crump's position with the private carrier, the delivery did not verify the accuracy of Mr. Crump's conclusions nor could it posto facto justify the warrantless seizure which formed the basis for Agent Lough's equally warrantless search and field test. Under the law of Wong Sun v. United States, supra, such illegally obtained information about the Heran package "taints" any other evidence derived as a fruit thereof.

In addition, the warrant fails because at the time the search warrant was issued, agents had no probable cause to believe that there was cocaine in the PFEIFER home. At this point, DEA agents had control over a package containing the suspected cocaine

and could only hope the package would be successfully delivered and accepted. After the search warrant was issued, the agents made the controlled delivery to the PFEIFERS' home. In Zurcher v. Stanford Daily, 436 U.S. 547 (1978)(emphasis added), the Supreme Court held that the issuance of a warrant must show (1) "that the items sought are in fact seizable by virtue of being connected with criminal activity" and that (2) "[t]he items will be found in the place to be searched." At the time the search warrant was issued, there was no guarantee the cocaine would be found at the PFEIFER residence. When the government introduces contraband into a home so agents can obtain a search warrant to seize it, the result is nothing more than a general exploratory search with the government providing the evidence justifying its entrance into premises. As such, the search can only be deemed exploratory.

General exploratory searches, conducted by government agents with or without a warrant, have been universally condemned. United States v. Martinez-Fuerte, 514 F.2d 308 (9th Cir. 1975), reversed on other grounds 428 U.S. 543 (1978). The evidence seized at the PFIEFER home was tainted by the defective search warrant and should have been suppressed. Mapp v. Ohio, 367 U.S. 643 (1961); Wong Sun v. United States, 371 U.S. 471 (1963).

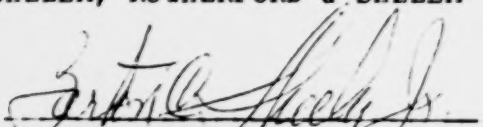
CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted to review the judgment and opinion of the Ninth Circuit Court of Appeal.

Dated: January 27, 1984

Respectfully submitted,

SHEELA, RUTHERFORD & SHEELA



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NOT FOR PUBLICATION

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. BRADLEY THOMAS PFEIFER, Defendant-Appellant.	)	CA No. 82-1498 DC No. CR 82-330-1
UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. DIANE RENE PFEIFER, aka DIANE HULTMAN, Defendant-Appellant.	)	CA No. 82-1499 DC No. CR 82-330-2 MEMORANDUM

Appeal from the United States District Court
for the Southern District of California
Honorable William B. Enright
District Judge, Presiding
Argued and Submitted February 8, 1983

Before: HUG and CANBY, Circuit Judges, and
ORRICK,* District Judge

*Honorable William H. Orrick, Jr.,
United States District Judge for the Northern

Following a bench trial on stipulated facts, Bradley Pfeifer and his wife, Diane Pfeifer, were each convicted of one count of possession of cocaine with intent to distribute, in violation of 21 U.S.C. § 841(a)(1). On appeal, they challenge the trial court's denial of their motions to suppress certain evidence.

We affirm the convictions.

FACTS

A man calling himself Miroslav Heran brought a package to the Federal Express office in Fort Lauderdale, Florida. It was addressed to a Peter W. Browning at the Pfeifers' address in San Diego. Robert Crump, Southern Regional Security Manager for Federal Express, became suspicious because the package was very light, was amateurishly wrapped, was not a business-to-business delivery, and cost much more to send by Federal Express than by any other means. Crump looked up Miroslav Heran and Induvet International (the business given as the return address on the package) in the telephone directory but found neither. The Federal Express airway bill, filled out by every customer, provides that all shipments

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District of California, sitting by designation.

are subject to opening and inspection by Federal Express. Crump opened the box and found approximately three ounces of white powder he believed to be cocaine wrapped in a plastic bag surrounded by feathers. He arranged with the Drug Enforcement Administration (DEA) for a controlled delivery of the package to DEA Agent Lough in San Diego.

The next morning a Federal Express agent in San Diego picked up the package at the airport and took it to his office. Lough then opened the package, removed a small quantity of the powder and field-tested it, confirming that it was cocaine. He obtained a search warrant for the address on the package, which he knew was the Pfeifers' residence.

Later that day, a Federal Express agent delivered the package. Diane Pfeifer, standing outside the house, took the package, saying that she knew Peter Browning and would accept delivery. About an hour later, DEA agents served their warrant and searched the house, finding the cocaine, other drugs, drug paraphernalia, cash, and papers reflecting other narcotics transactions.

ANALYSIS

The Pfeifers raise three contentions on appeal. First, they assert that Crump acted

as an agent of the government when he opened the package in Fort Lauderdale and therefore his warrantless search was unlawful. Second, they argue that Lough's warrantless seizure and search in San Diego were unlawful. Finally, they contend that the search of the house was unlawful because without the fruits of Lough's search, his affidavit contained insufficient probable cause to justify the issuance of the warrant. Even if we assume, without deciding, that Lough's search was unlawful, we conclude that the warrant for the search of the Pfeifers' house was valid.

The evidence elicited at the suppression hearing clearly established that the search by Crump was a private one. Like the search found to be private in United States v. McGreevey, 652 F.2d 849 (9th Cir. 1981), Crump's search was not instigated pursuant to an arrangement with the DEA. Federal Express conducted the search for its own purposes, to avoid employee theft and comply with federal regulations against shipment of narcotics by air. See 14 C.F.R. § 91.12 (1982). Federal Express's search consequently did not violate the Fourth Amendment. Illinois v. Andreas, 51 U.S.L.W. 5157, 5158 nn 2 & 3 (U.S. July 5, 1983). The search differed from the one held

to violate the Fourth Amendment in United States v. Walther, 652 F.2d 788 (9th Cir. 1981), where a former DEA informant conducted the search only in hope of reward from the DEA.

Lough's affidavit in support of the search warrant set forth the information furnished to Lough by Crump concerning the circumstances of Crump's search and its results. Because the search was private, the issuing magistrate could properly consider that information. The affidavit recited at considerable length the underlying facts and circumstances on which Crump based his conclusion that the package contained cocaine. The affidavit also recited Crump's position as Southern Regional Security Manager for Federal Express and the fact that the arrangements made by Lough with Crump for the controlled delivery of the package to San Diego corroborated both Crump's position and his statements regarding the nature of the package. These facts provided a substantial basis for concluding that probable cause existed to believe that the package contained narcotics and that, after a controlled delivery to the Pfeifers' house followed by surveillance, those

narcotics would be found in that house. Illinois v. Gates, 103 S.Ct. 2317, 2335-36 (1983). See Zurcher v. Stanford Daily, 436 U.S. 547, 559 (1978) (affidavit need only establish that items to be seized "'are or will be in the places . . . to be searched.'" (quoting ALI, A Model Code of Pre-Arraignment Procedure, § SS 220.1(3)).

The affidavit also did recite that Lough had opened the package in San Diego, removed some of the powder, and conducted a field test proving the powder to be cocaine. The Pfeifers, relying on Walter v. United States, 447 U.S. 649 (1980), contend that the warrantless search by Lough violated the Fourth Amendment. Grave doubt is case on the validity of that contention by Illinois v. Andreas, 51 U.S.L.W. 5157, 5158-59 (U.S. July 5, 1983). But even if we assume for purposes of argument that Lough's search was unlawful, the Pfeifers are not entitled to reversal.1/ Excluding the results of Lough's search, the remaining facts recited in the affidavit are sufficient to establish probable cause. The warrant is therefore valid,

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1/ It is a close question whether or not the Pfeifers demonstrated a sufficient privacy interest in the package to challenge its search. The trial court found that they did not. See Rawlings v. Kentucky, 448 U.S. 98

United States v. Miroyan, 557 F.2d 489, 494 n.2 (9th Cir.), cert. denied, 439 U.S. 896 (1978), and the district court did not err in denying the motion to suppress.

AFFIRMED.

(1980); United States v. Mackey, 626 F.2d 684, 687 n.4 (9th Cir. 1980). Because of our disposition of this case, we need not reach that issue. Compare United States v. Jacobsen, 683 F.2d 296 (8th Cir. 1982), cert. granted, 103 S.Ct. 1271 (1983) (recipient of Federal Express package had expectation of privacy) with United States v. Barry, 673 F.2d 912 (6th Cir.), cert. denied, 103 S.Ct. 238 (1982) (recipient of Federal Express package had no expectation of privacy).

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No. 83-1260

In the Supreme Court of the United States

OCTOBER TERM, 1983

BRADLEY THOMAS PFEIFER AND
DIANE RENE PFEIFER, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioners contend that evidence seized from their residence pursuant to a warrant should have been suppressed because the affidavit supporting the warrant reflected the results of a warrantless chemical analysis of cocaine shipped to their residence.

1. A man identifying himself as Miroslav Heran brought a package to an office of Federal Express, a private freight carrier, in Fort Lauderdale, Florida. The package was addressed to petitioners' residence in San Diego, California. The label on the package stated that it had been shipped by Induvet International. Pet. App. 2.

Robert Crump, a Federal Express security manager in Fort Lauderdale, became suspicious of the package and looked up Miroslav Heran and Induvet International in a

local telephone directory. When he found neither name listed, he opened the package. The standard Federal Express contract, filled out by every shipper, provides that Federal Express may open a package and inspect it. Pet. App. 2-3.

Inside the package, Crump found a plastic bag containing a white powder surrounded by feathers. Crump believed the powder to be cocaine, and he accordingly notified the Drug Enforcement Administration. The DEA told Crump to send the package to San Diego, where DEA Agent Lough reopened the package and removed and tested a small quantity of the powder. The test confirmed that the powder was cocaine. Pet. App. 3.

The DEA then obtained a search warrant for petitioners' residence. A Federal Express employee delivered the package and, an hour later, DEA agents executed the warrant. They found the cocaine, other drugs, drug paraphernalia, cash, and papers reflecting narcotics transactions. Pet. App. 3. Petitioners unsuccessfully sought to have this evidence suppressed and, after a bench trial in the United States District Court for the Southern District of California, were each convicted on one count of possession of cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1). Pet. App. 2. Petitioner Bradley Pfeifer was sentenced to two years' imprisonment under the provisions of 18 U.S.C. 4205(b)(2) and a five-year special parole term. Petitioner Diane Pfeifer was sentenced to two years' imprisonment, all but 120 days of which was suspended; three years' probation; and a three year special parole term.

2. As petitioners note (Pet. 7), the facts of this case are very similar to those of *United States* v. *Jacobsen*, 683 F.2d 296 (8th Cir. 1982), cert. granted, No. 82-1167 (argued Dec. 7, 1983). The question presented in *Jacobsen* is whether a law enforcement officer must obtain a warrant before taking actions like those of Agent Lough in this case.

But however the question presented in *Jacobsen* is resolved, petitioners are not entitled to relief. That is because the court of appeals in this case specifically held that even if the evidence produced by Agent Lough's actions had not been included in the affidavit supporting the search warrant, that affidavit would have established probable cause. As the court of appeals explained (Pet. App. 5-7 (footnote omitted)):

> Lough's affidavit in support of the search warrant set forth the information furnished to Lough by Crump concerning the circumstances of Crump's search and its results. Because the search was private, the issuing magistrate could properly consider that information. The affidavit recited at considerable length the underlying facts and circumstances on which Crump based his conclusion that the package contained cocaine. The affidavit also recited Crump's position as Southern Regional Security Manager for Federal Express and the fact that the arrangements made by Lough with Crump for the controlled delivery of the package to San Diego corroborated both Crump's position and his statements regarding the nature of the package. These facts provided a substantial basis for concluding that probable cause existed to believe that the package contained narcotics and that, after a controlled delivery to [petitioner's] house followed by surveillance, those narcotics would be found in that house. * * *
>
> The affidavit also did recite that Lough had opened the package in San Diego, removed some of the powder, and conducted a field test proving the powder to be cocaine. * * * But even if we assume for purposes of argument that Lough's search was unlawful, [petitioners] are not entitled to reversal. Excluding the results of Lough's search, the remaining facts recited in

> the affidavit are sufficient to establish probable cause. The warrant is therefore valid, * * * and the district court did not err in denying the motion to suppress.

The Eighth Circuit in *Jacobsen* reached the opposite conclusion about the search warrant affidavit in that case (82-1167 Pet. App. 8a): "Without the statement that a test indicated the presence of cocaine in the powder, the affidavit does not provide probable cause to believe the Jacobsens possessed cocaine in their home." While we believe that conclusion was erroneous, it turned upon the particular circumstances of that case and creates no conflict with the decision below on any legal issue.

The court of appeals' ruling in this case is plainly correct and does not merit this Court's review. Indeed, petitioners' argument — that the information provided by Crump did not establish probable cause (Pet. 15-24) and that Agent Lough's actions constituted a search that required probable cause and a warrant (Pet. 11-14) — leads to the wholly implausible conclusion that the government was powerless to do anything when it received Crump's information.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

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